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28 June 1956

MEMORANDUM FOR: General Counsel

SUBJECT: Implications of Cole v. Young and DCI's Termination Authority under Section 102(c) of the National Security Act of 1947

1. The Director of Central Intelligence is given an unusual removal authority by section 102(c) of the National Security Act of 1947: "Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the government if declared eligible for such employment by the United States Civil Service Commission."

2. The Act of August 24, 1912 referred to in the above quotation is embodied in the Code as 5 USC 652. It was amended by the Act of June 10, 1948 and further by 1949 Reorganization Plan No. 5 effective August 19, 1949. However, the key sentence has remained the same despite the amendments: "No person in the classified Civil Service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing."

3. There are two differences between section 22-1 and the Director's special authorities under the National Security Act - one of these is significant and the other probably not. The less important is the inclusion of the words "absolute" and "conclusive and final" in section 22-1 and their absence in the National Security Act. The significant difference appears in the provision of section 22-1 for suspension and termination "when deemed necessary in the interest of national security," whereas the Director's authority may be exercised "whenever he shall deem such termination necessary or advisable in the interest of the United States." Although the authority granted to the Director was probably based upon a recognition of the special security problems of this Agency, a plain reading of the two texts would indicate that the "interest of the United States"

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is broader than the "interest of national security" and that the Director, therefore, has a broader authority than the heads of other executive departments and agencies.

4. The Supreme Court, in Cole v. Young, ruled that an employee could not be dismissed under E.O. 10450 on a "loyalty basis" unless the agency head had made a determination as to the effect that continuation of his employment would have upon the "national security." To use the phraseology common in connection with E.O. 10450, a determination that the employee's position is "sensitive" would seem to meet this requirement. The Director has concluded, on what would seem to be a sound factual basis, that every position in the Central Intelligence Agency is sensitive. The holding in Cole v. Young, then, does not seem to affect the right of this Agency to terminate for "loyalty" grounds under E.O. 10450.

5. There are, however, implications in the case which may support the broadening in practice of the Director's authority under section 102(c) of the National Security Act of 1947.

6. The Supreme Court stated with regard to the term "national security", as used in the Act of 26 August 1950, upon which E.O. 10450 is primarily based: "While that term is not defined in the Act, we think it clear from the statute as a whole that the term was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from interior subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare."

7. In line with the reasoning just quoted, the Court argued against the Government's position in the case that "national security" as used in the Act was tantamount to "general welfare:" "For why could it not be said that national security in that sense requires not merely loyal and trustworthy employees, but also those that are industrious and efficient? The relationship of the job to the national security being the same, its demonstrated inadequate performance because of inefficiency or incompetence would seem to present a surer threat to national security, in the sense of the general welfare, than a mere doubt as to the employee's loyalty."

8. I believe a strong argument can be made that the "interest of the United States" referred to in section 102(c) is broader than the "national security" referred to in E.O. 10450, and that it may be as broad as the "general welfare" to which the Court refers. I believe also that the Director's previous determination that all positions in the Agency are "sensitive" strengthens this argument. I would conclude,

therefore, that the Director may exercise his special termination authorities under section 102(c) on grounds of security, loyalty, or unsuitability, and that such exercise would be on stronger ground since Cole v. Young than it was before.

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[redacted]

Assistant General Counsel

Attachment (Appendix A)